BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

SUMMARY.

The point for which the appellant is contending is simply this:

The Bankrupt executed indemnity contracts to the Petitioner surety assigning it all retained amounts or percentages due under various contracts, the assignment to become operative only upon default under any of its construction contracts, including failure to make payment when due for material used in the construction. Payment for material when due not having been made under one of three construction contracts, the Petitioner surety claimed the retained amounts due on the remaining two as a credit on its loss under the third contract, the surety having paid the materialmen. The Trustee in Bankruptcy claimed these amounts as against the appellant surety.

This issue was submitted on an Agreed Statement of Fact (R. 21) in which the ultimate facts were set forth.

The Referee found as a fact that there was no default and held against the Petitioner surety. The District Court adopted the finding of fact as to the absence of default and held against the Petitioner surety. The Circuit Court affirmed the District Court on the sole ground that where there is a concurrent finding of fact by the Referee and District Court, the Circuit Court would not disturb the same, refusing to consider any of the propositions of law submitted to it by the Petitioner surety.

Our contention is that—

(a) The Referee had no right to make, nor the District Court to adopt, a finding of fact in view of the Agreed Statement of Fact, which they were bound to accept.

(b) The question of default is one of law and not of fact.

(c) This being true, the Circuit Court could not possibly affirm the lower Court on the ground that it would not disturb a ruling of the lower Court based upon concurrent findings of fact by the Referee and the lower Court, they under the circumstances of the present matter having no right to determine fact, nor was the question determined one of fact.

(d) The Circuit Court should have found that under the established facts of the Agreed Statement, default, as a matter of law, had been shown to have taken place when the Bankrupt failed to pay bills for material which were due before the Bankruptcy and which should have been then paid, but which the Petitioner surety eventually was compelled to pay, and that the claim of the Petitioner should therefore prevail. (35 S. W. (2) 692.)

A.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported in 134 F. (2) 725, 728 (Advance Sheets May 31, 1943). The opinion of the District Court has not been reported at this date.

The opinions of the Circuit Court, District Court and Certificate of the Referee appear in the Record as indicated below.

Opinion of the Circuit Court of Appeals filed April 8, 1943 (R. 60, 65).

Opinion of District Court filed March 30, 1942 (R. 46).

Certificate of Referee upon Petition for Review of Continental Casualty Company filed in District Court August 27, 1941 (R. 36-39 inc.).

B.

JURISDICTION.

The basis upon which the jurisdiction of this Court is invoked is fully set forth under the caption "Jurisdiction" in the Petition for Certiorari (*supra*, p. 3) and, while omitted from this Brief in the interest of brevity, is adopted as a part hereof.

C.

STATEMENT OF CASE.

A full statement of the case has been set forth in the Petition for Certiorari herein (*supra*, pp. 1-3) and for the sake of brevity will not be repeated.

D.

SPECIFICATION OF ERRORS.

The specifications of error which follow appear in interrogative form under the caption "Questions Presented" in the Petition for Certiorari (*supra*, pp. 3-5) with corresponding paragraph numbering.

The contention of Continental is that the Referee, District Court and Circuit Court committed material error in the following particulars.

(1) In making, adopting and affirming a finding of fact made by the Referee—

(a) When the case had been submitted on an agreed statement of fact which controlled the facts of the case,

(b) Which agreed statement showed no fact such as was found.

(2) In the refusal of the Circuit Court to consider the case on the propositions of law submitted and

in basing its refusal solely upon its unwillingness to disturb an unlawful and unjustifiable concurrent finding of fact by the Referee and District Court, such as is described in par. (1) of this caption.

(3) In the Circuit Court's affirming of the District Court on the authority of the cases cited in its opinion (R. 67), all of which authority is to the effect that where there is a concurrent finding of fact by a Referee and District Court, it will not be set aside on anything less than a demonstration of plain mistake, when, in the present matter, the case was submitted on an agreed statement of fact which did not contain the fact found by the Referee and the question so determined as fact was one of law.

(4) In determining the question of default under the Bankrupt's assignment of retained percentage to the surety, by reason of its failure to pay for material used in the work when payment was due, as a question of fact rather than as a question of law.

(5) The decision of the Circuit Court is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of *Employers Casualty Co. vs. Rockwell County*, 35 S. W. (2) 690, 692, which follows the general rule, holding that failure of a contractor to pay bills for material when due is, as a matter of law, a default under the contractor's assignment of deferred payments to surety, the District Court and the Referee in the present matter holding that default under similar circumstances is a question of fact and not of law.

(6) The decision of the Circuit Court in the present matter is in conflict with and has failed to apply the rule of law adopted by this Court in the case of *Wilson vs. Montgomery Ward Co.*, 312 U. S. 373, which holds that the effect of admitted facts is a question of law.

E.

ARGUMENT.

To avoid confusion we desire at the outset to inform the Court of the close connection of the present matter with that of the Maryland Casualty Company vs. the appellee herein (Circuit Ct. No. 9286) now pending in this Court on Petition of Bankrupt Trustee for Certiorari. (No. 1102, Oct. Term, 1942.) The two cases were heard together before the Referee, the District Court and the Circuit Court. The opinion of the District Court (R. 41-46) and of the Circuit Court (R. 60) deals with both cases. The situation in each with respect to the Bankrupt was substantially the same. The District Court, affirmed by the Circuit Court, permitted the recovery by Maryland of the retained contract balances it sought. Continental was not permitted to recover the retained balances which it sought, the difference between the two cases being described in the opinion of the District Judge (R. 46). For ease of reference it is here quoted.

> "The factual situation presented here is very similar to that involved in Maryland Casualty Company's petition for review. There is, however, a distinguishing factor here which, as I see it, bars completely the surety's right to prevail over the trustee, and that is the failure of the surety to establish that a default occurred prior to bankruptcy.
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> "It was determined in the Maryland case that assignments such as are involved here become effective only after default. Therefore, in order for the surety to claim priority over the trustee, it was essential that it show a default prior to bankruptcy, at which time the trustee's lien attached.
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> "No such showing having been made, the Referee's finding that there was no default is determinative of the case."

It is agreed that unless it showed "default" Continental could not prevail. It is of the finding as a fact that Continental had showed no default that we, among other things, complain. It is submitted that if Continental had been found to have shown default, as a matter of law, it would have been successful in its efforts in this proceeding.

In the following we consider separately each paragraph of the Specification of Errors.

(1) In making, adopting and affirming a finding of fact made by the Referee (a) when the case had been submitted on an agreed statement of fact which controlled the facts of the case, (b) which agreed statement of fact showed no fact such as was found.

The Referee had no right to make a finding of fact in view of the case having been submitted on an agreed statement of fact. The Referee himself states (R. 26):

> "This matter coming on to be heard upon * * * the agreed statement of facts between surety and the trustee * * *."

and in support of the above contention we submit the following authority:

> "Upon the submission of a controversy * * * upon an Agreed Statement of Facts, it is a general rule in the absence of an agreement by the parties to the contrary * * * that the Court can draw no inference of fact in favor of either party, even from the facts stipulated, except such inferences as a *matter of law* are necessary inferences."
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> 2 *American Jurisprudence*, p. 384, par. 23, and cases there cited.
>
> "(2) When a case is tried and submitted on Agreed Statement of Facts, the statement becomes the Court's

Finding of Fact and has the effect of a special verdict and in pronouncing judgment thereon the Court is bound by the stipulation."

McCarthy vs. Employers Ins. Co., 97 A. L. R. 292 (Annot.) (Mont. 1934);
61 F. (2) 14.

"If the facts are agreed upon and the questions of law alone are submitted to the court for its judgment, the Court can only respond to the questions of law arising from the admitted facts, and will not infer another fact and pronounce the law arising thereon."

25 *R. C. L.*, p. 1105, par. 13;
312 U. S. 373.

"So also the Court is conclusively bound by the facts stated and must render judgment according as the facts agreed upon require."

60 *C. J.*, p. 84, par. 78;
60 *C. J.*, p. 1191, par. 985.

(2) In the refusal of the Circuit Court to consider the case on the propositions of law submitted and in basing its refusal solely upon its unwillingness to disturb an unlawful and unjustifiable concurrent finding of fact by the referee and District Court such as is described in paragraph (1) of specification of errors.

(3) In the Circuit Court's affirming of the District Court on the authority of the case cited in its opinion, which authority is to the effect that where there is a concurrent finding of fact by a referee and District Court, the Circuit Court will not set it aside on anything less than a demonstration of plain mistake.

The Circuit Court in its opinion (R. 66) says:

"The District Court has confirmed the finding of fact of the Referee that default did not occur prior to

that time. Concurrent findings of fact of a referee in bankruptcy and a District Judge will not be set aside by a Circuit Court of Appeals on anything less than demonstration of plain mistake. See *Kowalsky v. American Employers Ins. Co.*, 90 F. (2d) 476, 480 (C. C. A. 6), and cases there cited.

"There has been no showing in this case that the Referee and the District Judge were plainly mistaken in their concurrent finding of the decisive fact. Upon the evidence in the case, a contrary finding below would have been clearly erroneous."

The *Kowalsky* case (R. 67) upon which the Circuit Court relied, applies only to such finding of fact as is made where there is a disagreement and dispute in the evidence in relation to its establishment and has no application to cases similar to the present matter where the fact is established by agreement between the parties, there being nothing left for the fact-finding entity of the court to determine.

We understand and appreciate the respect in which appellate courts hold conclusion as to fact by the fact-finding authority in our trial procedure and their unwillingness to disturb the same. That attitude is adopted by this Court in its opinion. The *Kowalsky* case and every other case along the same line cited in the opinion in the *Kowalsky* case apply only to finding of fact where the facts were in dispute. They have not the slightest relation to conclusions of law nor to cases submitted on agreed statement of fact.

(4) In determining the question of default under the bankrupt's assignment of retained percentage to the surety by reason of its failure to pay for material used in the work when payment was due, as a question of fact rather than as a question of law.

(5) The decision of the Circuit Court is in conflict with the rule of law laid down by the United States Circuit Court of Appeals of the Fifth Circuit in the case of Employers Casualty Co. v. Rockwell County, 35 S. W. (2) 692, which follows the general rule holding that failure of a contractor to pay bills for material when due is, as a matter of law, a default under the contractor's assignment of deferred payments to surety, the District Court and the referee in the present matter holding that default under similar circumstances is a question of fact and not of law, which holding the Circuit Court affirmed.

There can be no question that whether there was a default or not in the present matter is a question of law.

The following citation is foursquare with the present case and determines conclusively that failure to pay for materials under circumstances comparable to those existing in the present matter is a default as a matter of law and not as a matter of fact, and even though there had been a dispute of testimony as to the fact in the present case, which there was not, of course, it would still be a question of law for the court to determine.

> "(3) Highway contractors failing to pay bills for material and labor, * * * *as a matter of law*, were in default within contractor's assignment to surety of deferred payments."
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> *Employers Casualty Co. vs. Rockwell County*, 35 S. W. (2) 690, 692 (Texas, 1931).

and further as to "non-payment" constituting default as a matter of law:

"Ordinary meaning of the word 'default' when used with respect to an obligation created by contract is failure of performance, and, when used with reference to indebtedness, it simply means 'non-payment'."

Broadbury vs. Thomas, 27 P. (2) 402 (Calif.).

In the light of the indisputable authority of the cases cited above, and we find none holding otherwise, it is definitely established that "default or not" is a question of law and not of fact.

It should always be remembered that at no time has either the Referee, the District Court or the Circuit Court passed upon the proposition of the existence of a default except as a question of fact. Neither considered the matter as a question of law, nor passed upon it as such.

In the light of the foregoing it is obvious that the Circuit Court in the present matter is in conflict with the rule of law laid down by the Circuit Court of the Fifth Circuit in the case quoted above.

(6) The decision of the Circuit Court in the present matter is in conflict with and has failed to apply the rule of law adopted by this Court in the case of Nelson vs. Montgomery Ward Co., 312 U. S. 373, which holds that the effect of admitted facts is a question of law.

The *Nelson* case referred to in the caption of this paragraph is comparatively recent. The paragraph of the syllabus of the case applicable here is very short and is an exact quotation from the opinion of the court. The court in that case held—

"The effect of admitted facts is a question of law."

In the present matter the facts were admitted and agreed under the authority of the quoted language of the opinion of this Court in the case referred to in this subcaption, when this condition exists the operation and effect of the admitted facts is a question of law and must be so

considered by the court and so determined by the court. In the present case the facts were all agreed and were placed before the court in the form of an agreed statement of fact. From an agreed statement of fact it is submitted that the only question which can arise is one of law and in support thereof we have quoted the opinion of this Court in the case referred to in this sub-caption. In the present case the Circuit Court adopted exactly the opposite theory. From the statement of fact submitted to the Court in this case, the Referee in Bankruptcy and the District Court reached a conclusion of fact of their own and the Circuit Court rendered its opinion upon their erroneous conclusion and is therefore in conflict with and has failed to apply the rule of law adopted by this Court in the case to which we have referred.

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that the errors complained of may be corrected, and that for such purpose a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals and reverse it.

Respectfully submitted,

Lloyd F. Loux,
Attorney for Petitioner.

Orgill, Maschke, Wickham, Duffy & Loux,
H. Frank Van Lill,
1000 N. B. C. Bldg., Cleveland, Ohio,
Of Counsel.